Supreme Court, U.S.
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No. 94-533

In The

Supreme Court of the United States

October Term, 1994

MALONE AND HYDE, INC.,

Petitioner,

v.

GENERAL DRIVERS, SALESMEN, and WAREHOUSEMEN'S LOCAL UNION NO. 984, an Affiliate of the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN and HELPERS OF AMERICA, AFL-CIO,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

RESPONDENT, GENERAL DRIVERS, SALESMEN, AND WAREHOUSEMEN'S LOCAL UNION NO. 984, AN AFFILIATE OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO'S, BRIEF IN OPPOSITION

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PRELIMINARY STATEMENT

General Drivers, Salesmen, and Warehousemen's Local Union No. 984 ("Union") respectfully request this Court deny the Petition for Writ of Certiorari seeking review of the judgment of the United States Court of

Appeals for the Sixth Circuit officially reported at 23 F.3d 1039 (6th Cir. 1994).

ISSUE PRESENTED

Did the Court of Appeals err in ordering the Defendant to arbitrate the grievances of Richard Mack, with issues of alleged abandonment, withdrawal, estoppel, and waiver to be decided by the Arbitrator?

STATEMENT OF THE CASE

A. Material Facts.

The case at bar arises from an employment dispute involving Richard Mack, his former employer, Malone and Hyde, Inc. ("Malone and Hyde" or "Employer"), and the Union. Early in 1988, Malone and Hyde suspended and subsequently terminated Mack's employment. At the time, Mack was a member of the bargaining unit exclusively represented by the Union. Mack filed two (2) grievances pertaining to his discipline and termination and, on both occasions, the Union submitted the grievances to the Employer.

At the time the grievances were filed, Malone and Hyde and the Union were parties to a collective bargaining agreement ("CBA") that expired on January 8, 1989. A subsequent agreement expired on January 8, 1992. In November of 1991, Malone and Hyde withdrew recognition of the Union and, following the filing of a petition

seeking an election, the Union lost its representative status in May of 1992.

Article 8 of the CBA sets out the procedures applicable to the filing and resolution of grievances. Article 8 provides for arbitration in cases in which Malone and Hyde and the Union cannot reach settlement. The arbitrators are to be selected from panels requested from and furnished by the American Arbitration Association ("AAA").

AAA rules are set out in a publication, Voluntary Labor Arbitration Rules. The rules provide in part:

> 1. Agreement of Parties. The parties shall be deemed to have made these rules a part of their arbitration agreement whenever, in a collective bargaining agreement or submission, they have provided for arbitration by the [AAA] or under its rules.
>
> * * *
>
> 20. Representation by Counsel. Any party may be represented at the hearing by counsel or by another authorized representative.
>
> * * *
>
> 27. Arbitration in the Absence of a Party. Unless the law provides the contrary, the arbitration may proceed in the absence of any party who, after due notice, fails to be present or fails to obtain an adjournment. An award shall not be made solely on the default of a party. The arbitrator shall require the other party to submit such evidence as may be required for the making of an award.

The Union and Malone and Hyde processed Mack's grievances according to the CBA to the point of arbitration, but were unable to resolve the grievances at the pre-arbitration phases. Unable to reach a resolution, the Union requested that Mack's grievances be taken to arbitration. Mack, however, requested that he be represented by an attorney in light of his dislike for the Union agent assigned to represent him at arbitration. Mack's request for an attorney was denied, but a different union agent, Arthur B. Crutcher, Vice President of the Union, was assigned to represent him.

In August of 1988, an attorney, Kim G. Sims, notified the Union that she was representing Mack with regard to his arbitration hearing, and on September 9, 1988, Sims requested to be included in the selection of an arbitrator. On October 12, 1988, Crutcher received a letter from Mack advising him that Sims had been hired to represent Mack in the arbitration and requesting that all information regarding Mack's case be forwarded to Sims. In response to Mack's letter, Crutcher wrote Mack, stating as follows:

> Since you have made this request that Ms. Sims present your case, we are requesting specifically if you are disbarring the Local Union from presenting your cases and will use only officials from the Local Union as witnesses to testify.
>
> We, therefore, ask that you sign this letter releasing the Local Union of all of its duties, requirements, and obligations under the terms and provisions of the present contract with Malone and Hyde Company.

The bottom of Crutcher's letter contained a release, which Mack signed on November 16, 1988. Crutcher, in turn, notified Malone and Hyde that Mack had retained outside counsel.

In July of 1988, the AAA furnished panels of arbitrators to the representatives of both the Union and Malone and Hyde, who in turn selected separate arbitrators to hear the grievances. On October 14, 1988, the AAA sent letters to the Union and Malone and Hyde acknowledging their selections. In late October and early November of 1988, the AAA advised the Union and Malone and Hyde of the dates the arbitrators would be available for arbitration. In early December, the AAA requested information as to the current status of Mack's grievances from both the Union and Malone and Hyde. In response, Malone and Hyde wrote the Union on December 28, 1988, seeking clarification of the status of Mack's grievances. On January 12, 1989, the Union's attorney wrote Malone and Hyde stating as follows:

> [N]o action of [the Union] is to be construed as an abandonment of Mr. Mack's grievances. Neither should they be construed as acknowledging that the grievance has no merit. On the contrary, Mr. Mack desires to proceed to arbitration. He simply does not want a Union business agent representing him at the hearing. He has relieved the Union of any further obligations in the processing of his grievances and has retained an attorney, Ms. Kim G. Sims. . . .

On January 23, 1989, Sims wrote to Malone and Hyde to inquire about the grievance hearing. In response, Malone and Hyde, in a letter from its attorney dated

February 2, 1989, declined to acknowledge Sims' representation of Mack. On February 2, 1989, Malone and Hyde wrote the AAA stating that it was Malone and Hyde's position that it was relieved of any obligation to proceed further on the grievances.

On February 7, 1989, the Union was notified by the AAA that it would consider the matter closed unless an objection was filed. On April 5, 1989, the Union's attorney wrote the AAA stating that the Union had not withdrawn Mack's grievances and wished to proceed to arbitration. The letter noted that the grievant desired to have his own attorney process his grievance and that, despite the Union's consent, the Company had declined to arbitrate with Mack's personal attorney. In response to a request by the AAA for comments, Malone and Hyde asserted that it had no obligation to arbitrate Mack's grievances. In reply, the Union filed the lawsuit that is subject to the appeal at bar.

B. Lower Court Proceedings.

On May 12, 1989, the Union filed suit against Malone and Hyde pursuant to 29 U.S.C. § 185, alleging that Malone and Hyde refused to arbitrate grievances in violation of the CBA. The Union petitioned the Court to either compel Malone and Hyde to arbitrate or to decide the merits of the grievances. On October 8, 1991, the Union's Motion for Summary Judgment was denied, the Court concluding that Malone and Hyde was under no duty to arbitrate a grievance with an individual employee and his personal attorney, but determining that a fact issue existed as to whether the Union represented Mack and

whether the release signed by Mack constituted a formal rejection of Union representation.

At a hearing held on April 20, 1992, Judge Turner dismissed the Union's Complaint, ruling that Malone and Hyde acted properly in refusing to arbitrate with Mack and his attorney. The Court determined that since Mack was not a party to the CBA, he could not be a party to the arbitration, and any further processing of his grievance must be carried out by the Union. The Court further determined that issues as to whether the Union withdrew from or abandoned arbitration, whether the arbitration was time barred, and whether Malone and Hyde was entitled to equitable defenses are to be determined by an arbitrator.

Malone and Hyde filed a Notice of Appeal on July 24, 1992. The decision of the Court of Appeals, upholding the lower Court's ruling, was filed on May 11, 1994. A Petition for Rehearing and Rehearing *en banc* was denied on June 23, 1994. Malone and Hyde subsequently filed a Petition for Writ of Certiorari on September 17, 1994.

ARGUMENT

In Malone and Hyde's Petition for Certiorari, it argues that the rationale applied by the Court of Appeals, in affirming the District Court's Order referring Mack's grievances to arbitration, directly conflicts with applicable decisions of this Court. On the contrary, careful review of the Court of Appeals' decision attests to the fact that the Court's analysis and determination is entirely consistent with the rationale heretofore applied

by this Court. It is Malone and Hyde's contention that the District Court shirked its duty to determine "the arbitrability question", that is whether the parties agreed to arbitrate the dispute at bar. *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 208-09 (1991); *AT&T Technologies, Inc. v. Communication Workers of America*, 475 U.S. 643, 651 (1986); *John Wiley and Sons, Inc. v. Livingston*, 376 U.S. 543 (1964). In fact, after reviewing applicable CBA provisions, the Court of Appeals affirmed the District Court's determination that the parties had agreed to submit Mack's grievances to an arbitrator for determination.

Although the *AT&T Technologies* case is cited by Malone and Hyde as support for its contention that the District Court avoided its duty in the present case, the Union respectfully submits that the case in fact attests to the propriety of the District Court's determination and the subsequent affirmation by the Court of Appeals. In *AT&T Technologies*, this Court began its analysis by setting out four well-established principles governing arbitrability: (1) that "arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit" (citing, *Steelworkers v. Warrior and Gulf Navigation Company*, 363 U.S. 574, 582 (1960)); (2) that the question of arbitrability, that is, whether a CBA creates a duty for the parties to arbitrate a particular grievance, is undeniably an issue for judicial determination (citing, *Warrior and Gulf, supra*, at 583); (3) that, in deciding whether the parties agreed to submit a particular grievance to arbitration, a Court is not to rule on the potential merits of the underlying claims (citing, *Steelworkers v. American Manufacturing Company*, 363 U.S. 564, 568 (1960)); and (4) that when a contract

contains an arbitration clause, there is a presumption of arbitrability in the sense that "an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage" (citing, *Warrior and Gulf, supra,* at 582-83). The Court stated that the presumption is particularly applicable in the case of a broad arbitration clause (citing, *Warrior and Gulf, supra,* at 484-85). *AT&T Technologies, supra,* at 648-51.

In the *AT&T Technologies* case, the Court was asked to determine whether "because of express exclusion or other forceful evidence, the dispute over the interpretation of Article 20 of the contract, the layoff provision, is not subject to the arbitration clause." This Court held that the District Court erred in "ordering the parties to arbitrate the arbitrability question" and remanded the case back to the District Court for a determination of whether the contract's layoff provision was not subject to the contract's arbitration clause. *AT&T Technologies, supra,* at 652.

In its analysis of the dispute at bar, the Court of Appeals cited each of the principles this Court noted in its decision in *AT&T Technologies* as factors reviewed in its determination. The Court of Appeals next reviewed Article 13 of the CBA, citing its broad arbitration clause covering "any discharge, suspension, or dispute or controversy of any kind over the application of this agreement." The Court noted that the language contained in the arbitration provision was typical of a broad arbitration clause, strengthening the presumption favoring arbitrability. In light of a finding that the subject matter of

Mack's grievances pertaining to his discharge were contemplated under the CBA as issues subject to the CBA's arbitration provision, the Court of Appeals correctly concluded that the grievances should be decided by an arbitrator.

Despite Malone and Hyde's assertions to the contrary, the rationale employed by the Court of Appeals is in harmony with other decisions of this Court. The Court of Appeals has not asked the parties to "arbitrate the arbitrability question." Rather, it has exercised its duty to determine the parties' intent under the CBA and has concluded that Mack's grievances are subject to the contract's arbitration provisions. The Court of Appeals noted that, once it has determined that the subject matter of the dispute is properly arbitrable, "procedural" questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator. *John Wiley and Sons, supra,* at 557. Malone and Hyde's alleged defenses of abandonment, termination, estoppel, and waiver, all based on events that arose out of Mack's initial grievances over his discharge, were properly left for the arbitrator to determine.

In its Petition, Malone and Hyde argues that the decision of the Court of Appeals is in conflict with this Court's opinion in *Warrior and Gulf, supra,* in which the Court stated that the grievance procedure is a part of the continuing collective bargaining process. *Warrior and Gulf, supra,* at 581. Malone and Hyde contends that it should not be required to arbitrate with the Union in light of the fact that it has lost its bargaining representation rights. Likewise, Malone and Hyde contends that the Court of Appeals' decision conflicts with this Court's

opinion in *Nolde Brothers, Inc. v. Bakery and Confectionery Workers Union, Local 358*, 430 U.S. 243 (1977), in which this Court "carefully reviewed contract provisions in order to determine whether arbitration obligations terminated with the contract's expiration." In fact, this Court recognized in the *Nolde Brothers* case that a parties' obligation to arbitrate does not automatically cease upon termination of the CBA. *Nolde Brothers, supra*, at 252.

Despite Malone and Hyde's argument that the Court of Appeals failed to closely examine the CBA's provisions pertaining to termination of obligations under the contract, its decision indicates that the Court of Appeals did indeed consider the termination provisions, but that it questioned whether the termination language covered grievance procedures ongoing when the agreement terminated. In deciding to leave the matter to the arbitrator for determination, the Circuit noted that doubts as to whether a dispute is covered by an arbitration clause should be resolved in favor of coverage. In addition, the Court of Appeals cited decisions of this Court recognizing that a party's obligation to arbitrate does not automatically cease upon termination of a CBA and establishing the presumption that disputes arising under a CBA are arbitrable even after the CBA itself is terminated.

The Court of Appeals specifically addressed Malone and Hyde's contention that it is no longer bound by the CBA's arbitration clause in light of this Court's *Nolde Brothers* decision by distinguishing the facts addressed in that decision from those at bar. The Court noted that the *Nolde Brothers* decision pertained to a dispute that actually arose after the CBA had terminated. In contrast, the

dispute underlying Mack's grievances arose in 1988, while the CBA was still in effect. The Court reasoned that the presumption that disputes arising under a CBA are arbitrable even after the CBA itself is terminated should even be stronger in the case of Mack's grievances. A party who wrongfully resists the arbitration process until expiration of the contract ought not be rewarded for its conduct.

Finally, Malone and Hyde argues that the Court of Appeals' determination, that, regardless of whether the release executed by Mack is a "collateral agreement", the construction of the release is a question for the arbitrator not the Court, is in conflict with the Second Circuit cases of *Peerless Imports, Inc. v. Wine, Liquor and Distillery Workers Union, Local 1*, 903 F.2d 924 (2d Cir. 1990) and *Rochdale Village, Inc. v. Public Service Employees Union, Local 80*, 605 F.2d 1290 (2d Cir. 1979). Malone and Hyde further argues that the Court's opinion conflicts with the Tenth Circuit's decision in *Reid Burton Construction, Inc. v. Carpenters District Council of Southern Colorado*, 535 F.2d 598 (10th Cir. 1976). In fact, no such conflicts exist. The issues addressed in each of the cases cited by Malone and Hyde are readily distinguishable from those addressed in the case at bar.

In determining that the construction of the release at issue should properly be left to the arbitrator, the Court of Appeals relied on its decision in *Amalgamated Clothing Workers v. Ironall Factories Company*, 386 F.2d 586 (6th Cir. 1967). In *Amalgamated Clothing Workers*, the Court of Appeals, confronted with a separately negotiated settlement agreement between the employer and the union settling particular grievances of specified individual

employees, noted that "the parties had agreed to submit to arbitration any complaint or dispute arising out of or relating to the provisions of the CBA, or the interpretation thereof," and determined that the construction of the settlement agreement concerned the correct interpretation of the CBA and was, consequently, a properly arbitrable issue.

As the appeals court has noted, the *Peerless* and *Rochdale* cases, in which Courts held that agreements collateral to CBA's were properly examined at the District Court level, pertained to factual situations distinguishable from the one at bar and are unpersuasive. In the *Peerless* case, the Second Circuit held that an agreement settling a single labor dispute constituted a collateral agreement not to arbitrate and that construction of the agreement was properly before the Court. The Circuit concluded, however, that the arbitration clause in the existing CBA did not cover the grievance in question. Accordingly, the only existing basis for arbitration was an oral agreement to arbitrate the particular claim of the individual employee. The Court in *Peerless* specifically relied on the narrow scope of the arbitration agreement in its holding. In contrast, the present dispute pertains to grievances over Mack's suspension and discharge, disputes which are unquestionably subject to the CBA's arbitration clause.

In the *Rochdale* case, the Second Circuit addressed the issue of whether parties to a CBA terminated the agreement by entering into a side agreement. The Court held that such matters were beyond the scope of the CBA's arbitration clause, and therefore, were properly subject to Court determination. In the present dispute, Mack's

release does not concern termination of the entire agreement, only the arbitration of his grievances and is not collateral to the CBA because it relates directly to the CBA's arbitration and grievance provisions.

Finally, the *Reid Burton* case cited by Malone and Hyde is distinguishable from the present dispute. In the *Reid Burton* case, the Tenth Circuit considered the issue of whether a union, because of certain pleading and procedural tactics employed during District Court proceedings, were prevented by the equitable doctrines of waiver, estoppel, repudiation, or laches from asserting the arbitrability of the company's complaint. The Court held that because the conduct fell within its control, that is, because the misconduct occurred during the judicial proceedings themselves, the equitable defenses should have been considered by the Court. *Reid Burton, supra,* at 603. In concluding its discussion, the Tenth Circuit made it clear, that although it had concluded that the Court could appropriately consider equitable defenses arising out of conduct that occurred "solely during the course of the judicial process", the general rule is that such equitable defenses should be submitted to an arbitrator for determination. *Reid Burton, supra,* at 604. The *Reid Burton* case, in fact, attests to the soundness of the Court's decision in the case at bar.

Not only does the Court of Appeals' decision in the present case fail to establish a conflict between the Circuits, it is consistent with decisions throughout the Circuits addressing similar issues. *See,* for example, *Brotherhood of Teamsters and Auto Truck Drivers Local No. 70 v. Interstate Distributor Company,* 832 F.2d 507 (9th Cir. 1987) (dispute over termination of the CBA held to be

subject to arbitration); *International Brotherhood of Electrical Workers Local 1228 (AFL-CIO) v. WNEV-TV, New England Television Corporation*, 778 F.2d 46 (1st Cir. 1985) (whether procedural efforts were defective was for the arbitrator to decide); *Ottley v. Sheepshead Nursing Home*, 688 F.2d 883 (2d Cir. 1982) (whether a grievance had been waived was appropriate issue for arbitrator's determination); *Beer, Softdrink, etc. Local 744 v. Metropolitan Distributors, Inc., et al.*, 763 F.2d 300 (7th Cir. 1985) (it was for the arbitrator to decide whether party had waived its right to arbitration); *Automotive, Petroleum and Allied Industries Employees Union Local 618 v. Town and Country Ford, Inc.*, 709 F.2d 509 (8th Cir. 1983) (whether party complied with the CBA grievance procedure was question submitted to the arbitrator); *Local 406, International Union of Operating Engineers, AFL-CIO v. The Austin Company*, 784 F.2d 1262 (5th Cir. 1986) (arbitrator should determine whether the party had met the requirements for taking a grievance to arbitration); *Local Union 370, International Union of Operating Engineers v. Morrison-Knudsen Company, Inc.*, 786 F.2d 1356 (9th Cir. 1986) (the Court stated that, once it is determined that the parties were obligated to submit the subject matter of the dispute to arbitration, the procedural questions growing out of the dispute, including defenses of waiver, estoppel, and mootness, are properly left to the arbitrator for determination); *see also, International Union of Operating Engineers Local 150 v. Flair Builders, Inc.*, 406 U.S. 487 (1972); *Alabama Power Company v. IBEW Local 391*, 612 F.2d 960 (5th Cir. 1980). The decision of the Court of Appeals not only fails to create the conflict among the Circuits as asserted by Malone and

Hyde, it is harmonious with numerous court decisions from around the Circuits addressing similar issues.

CONCLUSION

The Union respectfully submits that the underlying issue to be construed by the Court is whether or not Mack's suspension and a discharge are subject to the arbitration clause of the CBA. Having decided that, all other issues are to be decided by the arbitrator. Accordingly, the Union prays that the Court will deny Malone and Hyde's Petition for Writ of Certiorari.

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